

**REMARKS**

This is in response to the Office Action that was mailed on December 22, 2005. The recitation of claim 3 is incorporated into claim 1, and accordingly claims 2 and 3 are cancelled, without prejudice. A clerical error in claim 11 is corrected. No new matter is introduced by this Amendment. Applicants confirm the election of claims 1-11. Claims 1 and 4-16 are pending in the application, with claims 12-16 being withdrawn from consideration on their merits.

THE DALLY REFERENCE. Claims 1 and 2 were rejected under 35 USC § 102(b) as being anticipated by US 6,299,916 B1 (Dally). This ground of rejection is rendered moot by the incorporation into claim 1 of the recitation of non-anticipated claim 3.

THE GAMAY REFERENCE. Claims 1-6 and 8-10 were rejected under 35 USC § 103(a) as being unpatentable over US 5,935,634 (Gamay). Claims 7 and 11 were rejected under 35 USC § 103(a) as being unpatentable over Gamay in view of US 4,232,050 (Rule). The rejections are respectfully traversed. It is noted that the Gamay disclosure is discussed in paragraph [0008] of the specification.

The Examiner acknowledges that the Gamay disclosure is of a shelf stable cheese with a water activity of 0.86. The Examiner admits that "Gamay however is silent to the range of water activity below 0.86 to which his invention is intended to encompass". Applicants respectfully submit that what is "intended" by a reference is irrelevant – what matters is what the reference discloses and teaches, not what it intends.

The Examiner refers to lines 53-58 in column 2 of Gamay as allegedly suggesting the use of lower water activity levels in his cheese product. What Gamay actually teaches in lines 53-58 of column 2 is:

Limiting water activity for multiplication of *Staphylococcus aureus* were: with glycerol 0.884 to 0.890, with salt 0.861 to 0.870, and with sodium lactate 0.920 to 0.943. Corresponding ranges for *Salmonella* spp. were: with glycerol 0.918 to 0.923, with salt 0.942 to 0.950, and with sodium lactate 0.943 to 0.951.

It is not clear why the Examiner believes that this suggests a water activity  $A_w$  of less than 0.50.

In contrast to the Examiner's theory on what Gamay teaches, it is noted in passing that Gamay expressly teaches that "The bacteria tolerate ... low-water activity". Column 2, lines 46-48.

Manifestly, the Examiner has failed to state a sustainable rejection based upon the Gamay reference.


INFORMATION DISCLOSURE STATEMENTS. Applicants gratefully acknowledge the Examiner's return of initialed forms PTO-1449 filed herein on October 1, 2003 and April 19, 2004. Unfortunately on the October 1, 2003, the Examiner failed to initial the entry under "other documents". The Examiner is respectfully requested to provide Applicants with a fully initialed copy of the 10/1/03 form PTO-1449.

CONTACT. If there are any questions concerning this application, please contact Richard Gallagher, Registration No. 28,781, at (703) 205-8008.

In view of the above amendment, applicant believes the pending application is in condition for allowance.

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Respectfully submitted,

By  #28,781

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